Nos. 10-238 and 10-239

16

Supreme Court, U.S.
FILED
FEB 14 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,

Respondents.

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does the First Amendment allow Arizona to condition the release of a portion of government subsidies to publicly funded candidates on the campaign activity of privately funded candidates and independent expenditure groups?

PARTIES TO THE PROCEEDINGS

State Respondents agree with the parties to the proceedings that Petitioners list, but note that Timothy J. Reckart has replaced Gary Scaramazzo on the Citizens Clean Elections Commission and that Royann J. Parker has resigned from the Commission and therefore is no longer a party. Sup. Ct. R. 35.

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STATEMENT OF THE CASE

I. POLITICAL CORRUPTION IN ARIZONA AND THE PASSAGE OF THE CITIZENS CLEAN ELECTIONS ACT.

Over the past twenty-five years, Arizona voters have attempted to address the threat of corruption and its deleterious effects on the public's faith in government. In 1986, voters passed Proposition 200, which established Arizona's contribution limits for state-level campaigns. Ariz. Rev. Stat. ("A.R.S.") § 16-905 (2010) (historical and statutory note). Under those original contribution limits, individual contributors could give up to $200 per election to a legislative candidate and up to $500 per election to a statewide candidate.[1] *Id.*

Five years into Arizona's experiment with contribution limits, Arizona voters witnessed the worst public corruption scandal in its history. Joint Appendix ("J.A.") 122-161, 600. The scandal, which came to be known as AzScam, resulted from a police sting operation in which an undercover informant posed as a

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[1] Pursuant to A.R.S. §§ 16-905(H) and -959(A), the Secretary of State adjusts the dollar amounts in many Election Code and the Clean Elections Act provisions for inflation every two years. For simplicity, except where otherwise indicated, the brief will cite the current values from the relevant statutes. *Participating Candidate Expenditure & Contribution Limits for 2010 Elections*, http://www.azsos.gov/election/2010/Info/CCEC_Biennial_Adjustment_Charts.htm; *2009-2010 Contribution Limits*, http://www.azsos.gov/election/2010/Info/Campaign_Contribution_Limits_2010.htm.

Nevada businessman seeking to open a casino in Arizona. Newspaper reports from the time recounted Phoenix police officers videotaping state legislators accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. J.A. 122-24. Those videotapes revealed elected officials accepting thousands of dollars in bribes while cynically proclaiming that "do[ing] deals" was the way of the Legislature. J.A. 142. State Representative Bobby Raymond scoffed that there was "not an issue in the world that I give a (expletive) about." J.A. 147. "I like the good life," said State Senator Carolyn Walker, "and I'm trying to position myself [so] that I can live the good life and have more money." J.A. 146-47. "We all have our prices," she told the undercover agent after accepting $15,000. J.A. 141. Representative Don Kenney planned to "quarterback" the effort to legalize gambling while serving as the judiciary committee's chairman. J.A. 137-38. He brought a gym bag to his meeting with the informant to haul in his take of $55,000 in cash. J.A. 138. In sum, close to ten percent of the state Legislature was implicated, allegedly receiving more than $370,000 in bribes. J.A. 152; *see State v. Walker*, 914 P.2d 1320, 1324-29 (Ariz. Ct. App. 1995) (detailing allegations).

AzScam inspired another round of anticorruption legislation. 1991 Ariz. Sess. Laws, 3d Spec. Sess., ch. 2 (imposing more stringent restrictions on lobbying activities). Yet despite those new laws, the appearance of *quid pro quo* corruption persisted. A seamless interplay between fundraising and lawmaking cast a

web of perceived corruption over the Arizona capitol. *See* J.A. 178-81, 190, 206-07, 214.

Tired of political scandals, Arizona voters passed the Citizens Clean Elections Act (the "Act") on November 3, 1998. A.R.S. § 16-940 (historical and statutory note). In approving the measure, voters declared their intent to "improve the integrity of [an] Arizona state government" that "[a]llows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction[,]" "[u]ndermines public confidence in the integrity of public officials[,]" and ultimately results in misuse of public resources through "subsidies and special privileges for campaign contributors." *Id.* It appears that candidates welcomed the opportunity to have a viable public-financing option, as participation in the Clean Elections system has increased from the first year of its implementation through 2008, when two-thirds of the candidates in the primary and general elections accepted public funding. J.A. 982, 663-64; McComish Pet. App. 15.

II. THE ACT'S OPERATION AND PROVISIONS.

The Act combats corruption and promotes free speech by providing an independent funding source for those candidates willing to abide by several restrictions while permitting traditional candidates to continue to use private funds. It establishes a finely calibrated system of issuing public funds that enables

it to meet its speech-enhancing and anticorruption goals by encouraging participation without wasting public funds.

To participate in the public-financing system, candidates must first raise a certain number of five-dollar qualifying contributions. A.R.S. §§ 16-946(B), -950(B), (D).[1] These contributions are not for the candidate's use, but rather are nominal demonstrations of public support that participants must turn over to the Clean Elections Fund to qualify for public funding. *Id.* § 16-946(A).

Next, participating candidates agree to a variety of restrictions on their campaign activities. They can raise only a limited amount of exploratory funds, or "seed money," from private contributions. Total private contributions are capped at ten percent of the initial grant, *id.* § 16-945(A)(2), and can be raised only from individuals and only in donations of $100 or less, *id.* § 16-945(A). Furthermore, publicly funded candidates may raise seed money only during the exploratory and qualifying periods that end seventy-five days before the general election. *Id.* §§ 16-945(A),

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[1] The number of five-dollar qualifying contributions required varies based on office. For example, legislative candidates must collect 220, candidates for treasurer 1,650, and candidates for governor 4,410. A.R.S. § 16-950(D). Pursuant to A.R.S. § 16-956(F), the Commission may adopt rules to adjust the number required. *See* Ariz. Admin. Code R2-20-105(I); *Citizens Clean Elections Act & Rules Manual*, http://azcleanelections.gov/ (follow "Acts and Rules Manual" hyperlink).

-961(B)(2), (3); *cf. id.* § 16-201 (setting the primary election on the tenth Tuesday before the general election). In raising seed money, candidates may not accept money from a political party or from political action committees. *Id.* § 16-941(A)(1). Moreover, the Act limits how much participating candidates may contribute to their own campaigns, *id.* § 16-941(A)(2), and requires them to attend public debates that the Citizens Clean Elections Commission sponsors, *id.* § 16-956(A)(2).

For both the primary and general elections the Act divides the distribution of public funding into two parts: the initial grant and subsequent matching funds. First, participating candidates receive one-third of the total funding allotment available in the form of an initial grant. *Id.* §§ 16-951(A), (C) (stating that the initial grant is equal to the original spending limits set for participating candidates), -952(E) (capping total funding at three times the original spending limit). There is an exception to this rule for candidates who run unopposed throughout a campaign, including in the primary and the general elections. *Id.* § 16-951(A)(3). For those candidates, the Commission releases only an amount of assistance equal to five dollars multiplied by the number of qualifying contributions that the candidate collected. *Id.* These candidates do not qualify for matching funds. *Id.* § 16-952(A).

Second, capped matching funds are issued to publicly funded candidates when (1) a privately funded opponent's expenditures (or, during the general election,

a candidate's receipts, less expenditures made during the primary campaign) exceed the publicly funded candidate's initial disbursement amount; (2) an independent expenditure committee makes an expenditure opposed to the publicly funded candidate; or (3) an independent expenditure committee makes an expenditure in support of a publicly funded candidate's opponent. *Id.* §§ 16-952(A)-(C)(2). If none of these occurs, then the participating candidate does not receive any public funds beyond the initial grant. Matching funds account for two-thirds of the total funds available to publicly funded candidates, which is to say they are capped at twice the initial grant. *Id.* § 16-952(E).[3]

The Act contains other provisions to ensure the efficient use of public money while providing a viable substitute for private campaign funding. For example, because independent candidates do not face primary challengers, the Act provides them with only a fraction of the initial grant normally given to participating candidates for primary elections. *Id.* § 16-951(A)(2).

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[3] The initial grant, and therefore full funding levels, vary based on the office. For example, legislative candidates are initially issued $14,319 for the primary election and $21,479 for the general election. Candidates for treasurer are initially issued $91,645 for the primary, and $137,468 for the general election. Gubernatorial candidates are initially issued $707,447 for the primary election, and $1,061,171 for the general election. *Participating Candidate Expenditure & Contribution Limits for 2010 Elections*, http://www.azsos.gov/election/2010/Info/CCEC_Biennial_Adjustment_Charts.htm; *see* A.R.S. § 16-961(G), (H). Thus, the full funding for a participating candidate running for governor in the general election is $3,183,583. A.R.S. § 16-952(E).

Also, candidates who campaign in one-party dominant districts may reallocate funds from the general election to the primary election with a corollary reduction in their general election outlay. *Id.* § 16-952(D). In all cases, unspent funds must be returned to the fund at the end of both the primary and general elections. *Id.* § 16-953.

None of the restrictions discussed above apply to nonparticipating candidates. The matching funds provision places no limit on the total amount of funds that they may raise from private donors, and they are free to raise private money throughout the entire campaign. *Id.* § 16-905(A)-(E) (contribution limits for nonparticipating candidates). They may also raise private money in larger amounts than participating candidates. For example, a non-participating gubernatorial candidate may accept contributions of up to $840 from individuals, which is eight times the limit imposed on participating candidates. *Id.* §§ 16-905, -945(A). They may also accept money from political parties or political action committees. *Id.* § 16-905(C)-(D). Finally, there is no limit on the amount of personal money that non-participating candidates may use on their own campaigns. *Id.* § 16-905(N).

A five-member, bipartisan Citizens Clean Elections Commission administers the Act. *Id.* § 16-955(A). Among other duties, the Commission oversees the distribution of monies from the Clean Elections Fund. *Id.* § 16-952(A)-(B). The Clean Elections Fund, which the Act established, is financed by voluntary donations, tax contributions, levies on criminal and civil

fines, and qualifying contributions that Arizona voters make. *Id.* §§ 16-946(A), -954(A)-(C). The Commission is a public body that is subject to Arizona's open meetings law, and therefore may take official action only in public meetings. *Id.* § 38-431.01. It is empowered to make rules to administer the program after public comment, *id.* § 16-956(C), and is responsible for educating voters about candidates through publications and debate sponsorship, *id.* § 16-956(A)(1)-(2).

Although the Act gives the Commission authority to enforce its terms, *id.* § 16-956(A)(7), it sharply limits the Commission's discretion in issuing matching funds. When the Commission receives notice from a report that is filed or from other information that is brought to its attention that an event requiring it to distribute funds to a candidate has occurred, it must distribute these funds immediately. *E.g.*, *id.* § 16-952(A) (stating that the Commission "shall immediately pay . . . to the campaign account of any participating candidate"). Similarly, in the case of independent expenditures, matching funds are distributed after a communication expressly advocates for or against a candidate using specific words, or otherwise has "no reasonable meaning other than to advocate the election or defeat of the candidates." *Id.* §§ 16-901.01(A)(1), -952(C). Commission actions

are subject to judicial review. *Id.* §§ 41-1092 to -1092.12.[4]

III. MATCHING FUNDS PRINCIPLES.

The amount of money necessary to run a viable campaign depends on how competitive the race is, and Arizona races have varied widely in their competitiveness. J.A. 714-15. Research indicated that in the years immediately preceding the Act's adoption, campaign costs varied from $10,000 to $80,000. J.A. 715. Given that variance, the Act's drafters believed they could not set a fixed amount of public assistance for all elections without overfunding some campaigns and underfunding others. J.A. 715-16. "[I]f we kept the dollar amount given to the Clean Elections Act candidates at a, say, 10,000-dollar amount, then we could have a situation where it would be too easy to outspend the Clean Elections candidate and no one

[4] Although these are not relevant to the questions presented, Petitioner McComish's efforts to discredit the Commission are not accurate. McComish Br. at 77. Petitioners' cited statements do not support Petitioners' allegations of bias. The Arizona Republic Editorial does not mention the Commission's actions, J.A. 303, nor does former Governor Janet Napolitano mention the Commission in her speech to the Brennan Center for Justice. J.A. 352-53. The Foothills Focus article details complaints by a person unhappy with the results of decisions in favor of an opposing party's politicians. J.A. 305-07. Similarly, the news reports address only disgruntled Commission employees and campaigns. J.A. 888, 890-91.

would run as a Clean Elections candidate," framer Louis Hoffman testified. J.A. 715-16.

> On the other hand, if we set the Clean Elections allocation at $30,000, so as to cover the bulk of the competitive races as well . . . then we would have an enormous waste of government money. . . . [I]n addition we would encourage, excessively encourage candidates to run as Clean Elections Act candidates, because, you know, they would be getting such a large amount of money. . . .

J.A. 716. To provide for an efficient, effective public-funding scheme, the Act correlates the release of public funds to the actual campaign activity of each race. Doing so saves the State money and ensures that no more assistance than necessary to disseminate the candidate's message is distributed.

Arizona's finely calibrated system reflects the realities of campaign operations. The initial disbursement allows a participating candidate to make the investment necessary to run a credible campaign. J.A. 430, 716. And when opponents and independent groups attack the participating candidates, the participating candidates respond, just as they would in a purely privately funded election. Participating candidates and officeholders have stated that the availability of matching funds was a critical factor in their decision to participate in the Clean Elections program. J.A. 387-88, 429, 441, 537-39. Without matching funds, they would have not been able to communicate with voters or respond to false or misleading attacks by

independent groups. J.A. 429. Participation in the Clean Elections program would decline if matching funds were eliminated. J.A. 537-39, 590-91, 638. However, the Act's framers saw no need to provide unlimited public assistance. J.A. 716-17. As Louis Hoffman explained, "[W]e thought that at some point there was – you would have enough money to get out your message. And if the non-participating candidate outspent you, so be it." J.A. 717.

As anticipated, matching funds have engendered more political speech. J.A. 591, 717. Since the Act's adoption in 1998, Arizona has experienced an increase in both the number of candidates running for elected office and the amount of money being spent in state elections. J.A. 534-37, 876, 915-16, 921-22, 942. Historical evidence therefore disproves Petitioners' claims that matching funds burden speech. If matching funds deterred speech, then nonparticipating candidates facing Clean Elections candidates would spend *up to but not beyond* the matching funds threshold. J.A. 876. That has not been the case. J.A. 876-87. Anecdotally, Petitioners could not cite specific instances in which they decided not to raise or spend funds. Dean Martin could not recall if he actually triggered matching funds in his 2006 race for state treasurer. J.A. 575, 579. State Senator Burns could not show that he had reduced his political campaigning as a result of the Act. J.A. 436-38. He further testified that he would raise and spend whatever money was necessary to get out his message. J.A. 434. Representative Murphy testified that he had

never turned away a campaign donation, and he could not identify anyone who chose not to contribute to him because of matching funds. J.A. 412. Representative Murphy's own campaign consultant advised him to raise as much money as he could from all sources regardless of its effect on matching funds. J.A. 594-95. In sum, nonparticipating candidates continue to raise and spend money without considering their opponents' ability to receive matching funds. J.A. 433-34.

IV. PETITIONERS' MISLEADING STATEMENTS.

Petitioners' statements regarding the Act's purposes are misleading and are in many cases belied by the very documents and testimony upon which they rely. First, contrary to Petitioners' claims, the Act was not designed to advance a particular political agenda. Arizona Free Enterprise ("AFE") Br. at 9-10. An internal memo by the initiative's campaign manager explicitly rejected the notion that the initiative sought particular legislative or ideological outcomes. J.A. 213. So too did the testimony of current commissioner and Act proponent Louis Hoffman. He testified that "[w]e were trying to set a policy that would apply globally, regardless – not against particular individuals." J.A. 722. Arizona Free Enterprise Petitioners claim that Mr. Hoffman "sought to reduce the influence and relative voice of certain business groups." AFE Br. at 9. Yet when Mr. Hoffman acknowledged the perceived power of particular individuals – whether they were involved in real estate development or

casino gaming – he did so in light of then-recent scandals such as AzScam and the Keating Five. J.A. 719-23. Similarly, supporting arguments produced for the Arizona Secretary of State's ballot proposition guide did not advocate for the Act as a substantive policy, but as an election reform to "halt[ ]" or "stop[ ]" corruption. J.A. 226-30. Proponents spoke from firsthand experience of the "pervasive and corrosive effects of lobbyist money in political campaigns." J.A. 229. To the extent that supporters of the Act believed that particular issues were shortchanged in the then-existing finance system, their perceptions were fueled by "ample evidence" of "continuing and repeated corruption in Arizona." McComish Pet. App. 9.[5]

Petitioners' allusions to "leveling the playing field" are not presented in an accurate manner either. *See* AFE Br. at 9; McComish Br. at 38, 66. Petitioners suggest that "leveling the playing field" means creating equal resources for candidates, but the cited materials do not support their sweeping factual claims. They proffer a chart of statements ostensibly

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[5] Although not relevant to the McComish Petitioners' alleged burden or the matching funds' substantial relation to preventing corruption, McComish Petitioners assert that "gaming" of the matching funds system is "rampant." McComish Br. at 71-72. Yet these allegations are isolated, rumored and/or theoretical. What is more, Petitioners do not acknowledge that the commission has since amended its rules to prohibit matching funds in the event of teaming tactics. Ariz. Admin. Code R2-20-113(F), *Citizens Clean Elections Act & Rules Manual*, http://www.azcleanelections.gov/ (follow "Act and Rules Manual" hyperlink).

demonstrating matching funds' ulterior purpose in limiting speech and equalizing resources. AFE Br. at 9 (citing J.A. 809-55); McComish Br. at 38, 66 (same). First, the chart does not distinguish between post- and pre-enactment statements. Second, the chart indiscriminately cites statements without regard to whether the alleged speaker was involved in the development of the Act or was actually a proponent. For example, the chart includes news reports that do not necessarily reflect the views of the Act's supporters. *E.g.*, J.A. 813, 814, 845.

Third, most of the statements relating to spending limits focus on the limits by which participating candidates themselves choose to abide. *E.g.*, J.A. 810 (entry from Frequently Asked Questions about Arizona's Clean Elections System) (explaining participants agreements); *id.* (entry from Talking Points) (explaining limitations on participants); J.A. 813 (entry from Why Clean Elections is Important) (noting that "*[c]andidates who run [c]lean* abide by spending limits to keep the cost of campaigns down") (emphasis added); J.A. 815 (entry from Color of Money: the 2004 Presidential Race); J.A. 818 (entry from Clean Money Campaign Reform); J.A. 820 (entry from Revitalizing Democracy, Clean Elections Reform Shows the Way Forward); J.A. 829 (entry from Summary of the Arizona Clean Elections Institute); J.A. 833 (entry from Clean Elections Media Kit).

Finally, only a handful of the quotations in the chart even address the matching funds provision, and even these statements demonstrate the different contexts in which the phrase "level the playing field"

has been used. *E.g.*, J.A. 811, 845, 851. The term "playing field" has been used in the context of promoting of voter participation through qualifying contributions, *e.g.*, J.A. 308, 852, and of expanding electoral opportunities to include candidates who might otherwise choose not run. *E.g.*, J.A. 816, 819, 821. Neither of these has anything to do with equalizing resources.

V. THE PROCEEDINGS BELOW.

On August 21, 2008, McComish Petitioners filed their Complaint against the Arizona Secretary of State and the Citizens Clean Election Commission members. J.A. 1. They alleged that the matching funds provision violated their rights under the First and Fourteenth Amendments to the U.S. Constitution and they sought to deny their opponents access to two-thirds of the funds made available to participating candidates in the form of matching funds. They claimed that conditioning the distribution of funds on the activities of nonparticipating candidates and of those making independent expenditures had a chilling effect on their spending because it caused them to avoid or delay spending to prevent participating candidates from receiving matching funds. After considerable discovery, cross-motions for summary judgment were filed. J.A. 31-32.

On January 20, 2010, the district court granted Petitioners' motions for summary judgment, denied Respondents' motions for summary judgment, and enjoined enforcement of the Act's matching-funds provision, A.R.S. § 16-952. McComish Pet. App. 47-80.

Even in granting summary judgment for Petitioners, the district court found no definitive evidence that matching funds in fact deterred spending in Arizona, *id.* at 54, and recognized that it was "illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on Plaintiffs." *Id.* at 66 (citing *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

After acknowledging there would be no question of the Act's constitutionality if it simply provided the full amount of available funds, the district court noted that "[i]f a single lump sum award would not burden Plaintiffs' free speech rights in any cognizable way, finding a burden solely because of the incremental nature of the awards seems difficult to establish," *id.* at 66-67 (footnote omitted). The district court, however, concluded that "[d]espite the unsettling nature of Plaintiffs' claims, *Davis* [*v. Federal Election Commission*, 554 U.S. 724 (2008)] requires this Court find Plaintiffs have established a cognizable burden." *Id.* at 67. The court also believed that notwithstanding these findings *Davis* required it to hold that matching funds are subject to strict scrutiny. *Id.* at 69. The court recognized that the "anticorruption interest supports some aspects of the Act," but found that "the Act's application to self-financed candidates" was not justified by that interest. *Id.* at 70-71. The court also found that the Act did not survive strict scrutiny because it was not narrowly tailored to the extent it burdened the speech of self-financed candidates. *Id.* at 72.

The Ninth Circuit reversed. *Id.* at 39. First, on the issue of what burden matching funds imposed on Petitioners' speech, the court of appeals recognized that "[a]lthough Plaintiffs [could] not point to any specific instance in which their speech has been chilled because of the Act," *id.* at 32, there existed the potential for "a theoretical chilling effect on donors," *id.* at 34. Such a "minimal" burden on speech, the court concluded, is subject to intermediate scrutiny. *Id.*

Next, the court of appeals held that the Act satisfied intermediate scrutiny. *Id.* Arizona's "interest in eradicating the appearance of *quid pro quo* corruption to restore the electorate's confidence in its system of government is not 'illusory,' it is substantial and compelling." *Id.* at 35 (quoting *Buckley*, 424 U.S. at 26-27). The court also found that "the State has an interest in providing matching funds to encourage participation in its public funding scheme." *Id.* Finally, the court rejected the district court's reasoning that this interest was mitigated when a publicly financed candidate was running against a self-funded candidate because "[i]t is not relevant under this analysis what the source of a nonparticipating candidate's campaign contributions is when he or she triggers matching funds." *Id.* at 37. Thus, the court of appeals held that "matching funds bear a substantial relation to the State's anticorruption interest." *Id.*

In reaching this conclusion, the court of appeals rejected Petitioners' claims that *Davis* dictated the

result in this case. *Id.* at 28. The court observed that "[t]he law in *Davis* was problematic because it singled out the speakers to whom it applied based on their identity." *Id.* Furthermore, the scheme in *Davis* was designed to "'level electoral opportunities'" between candidates by seeking to "disadvantage the rich." *Id.* at 27 (quoting *Davis*, 554 U.S. at 741). The court concluded that in contrast, Arizona's program involves candidates in distinct regulatory regimes and does not "single[ ] out the speakers to whom it applie[s] based on their identity." *Id.* at 27-28. The court recognized that Arizona's procedure does not change the "playing field" between two candidates as the scheme in *Davis* did, but rather provides funding regardless of the nonparticipating candidate's financial resources. *Id.*

In his concurrence, Judge Kleinfeld agreed that the Act passed constitutional muster, but reasoned that Arizona's public-financing system simply imposed "no limitations whatsoever on a [nonparticipating] candidate's speech." *Id.* at 39. He further reasoned that "[t]he Arizona scheme does not manipulate the limits on private donors' contributions according to whether a competing candidate is participating in the government funding scheme. Had it done so, *Davis* would apply by analogy." *Id.* at 39-40.

SUMMARY OF ARGUMENT

The court of appeals correctly upheld Arizona's matching funds provision against Petitioners' First Amendment challenges. The matching funds provision is an important part of the voter-approved Citizens Clean Elections Act, which deters *quid pro quo* corruption and the appearance of corruption by providing Arizona candidates with an option to run for office without depending on outside contributions. The matching funds provision conditions the release of two-thirds of the total public funds available in a race on the aggregate campaign activity in that race. As a result, Arizona's public-funding system is tailored to provide candidates in competitive races with sufficient funds to run effective campaigns. At the same time, the public-funding system protects the public fisc by not overfunding candidates in less competitive races. Finally, the matching funds provision creates a viable public-funding option that does not run the risk of coercing any candidate into accepting that option.

1. In *Davis*, the Court applied strict scrutiny to a provision that granted a discriminatory, asymmetric fundraising advantage to one privately financed candidate when another privately financed candidate spent a specific amount of personal funds. 554 U.S. at 729. The Court found this provision to be an "unprecedented penalty" against the privately funded candidates who chose to spend personal funds on their campaigns. *Id.* at 739. *Davis* does not require strict scrutiny in the instant case because the matching

funds provision is not a penalty. First, the matching funds provision is not applied in a discriminatory or asymmetric way because it does not treat similarly situated candidates differently. Publicly funded candidates accept a host of countervailing burdens in order to qualify for matching funds, by contrast, the privately funded candidates in *Davis* who benefited from the fundraising advantage accepted no additional restrictions or limitations. *Id.* at 729-30. Second, the provision at issue in *Davis* was a contribution limit that was stricter for one privately funded candidate than it was for another, *id.* at 738; the matching funds provision provides public funds to publicly funded candidates, but does not limit the fundraising or spending of privately funded candidates. Third, no matter how much personal money the self-funded candidate in *Davis* spent after reaching the threshold, his opponent would receive a fundraising advantage until the opponent raised funds to match the self-funded candidate's. *Id.* at 729.

Conversely, the matching funds provision is simply a method of allocating the total public funds available to publicly funded candidates, and is therefore capped, allowing privately funded candidates to outspend publicly funded candidates. For these reasons, conditioning the release of two-thirds of the total public grant on the aggregate campaign activity in a particular race is not a penalty against any privately funded candidate or independent expenditure group in that race. This is consistent with the factual record in this case in which Petitioners have been unable to demonstrate that the matching funds

provision has chilled their speech or the speech of other political actors in Arizona. Consequently, *Davis* does not require that strict scrutiny apply to the matching funds provision.

Citizens United v. Federal Election Commission, 130 S. Ct. 876, 914 (2010), is a better analogy to this case. In that case, the Court required that disclosure and disclaimer requirements be substantially related to a sufficiently important governmental interest in order to survive a First Amendment challenge because these requirements "may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Id.* at 914 (internal quotation marks omitted). Despite record evidence to the contrary, Petitioners claim that they may restrict their campaign activity in an effort to delay or prevent their publicly funded opponents from receiving the matching funds portion of public funding. AFE Br. at 30; McComish Br. at 55. So Petitioners allege that the matching funds provision may burden their ability to speak, but it imposes no ceiling on campaign-related activities and does not prevent Petitioners from speaking. Accordingly, the Court should require that the matching funds provision be substantially related to a sufficiently important governmental interest in order to survive Petitioners' First Amendment challenge.

2. Preventing corruption and the appearance of corruption is a sufficiently important governmental interest to justify the matching funds provision. The framers recognized that a successful government required "that every practicable obstacle should be

opposed to cabal, intrigue, and corruption." *The Federalist No.* 68, at 364 (Alexander Hamilton) (IndyPublish 2002). Furthermore, this Court has frequently recognized "preventing corruption or the appearance of corruption are . . . legitimate and compelling government interests . . . for restricting campaign finances." *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (*NCPAC*).

It is just as well established that public-funding systems serve to prevent *quid pro quo* corruption and the appearance of corruption. Over thirty years ago the Court wrote, "It cannot be gainsaid that public financing . . . furthers a significant governmental interest." *Buckley*, 424 U.S. at 96. It follows that a system which eliminates the need for a candidate to accept private dollars would prevent "financial *quid pro quo*: dollars for political favors." *NCPAC*, 47 U.S. at 497. Indeed, in *Davis*, the Court recognized that self-funded candidates were less susceptible to corruption because they were not dependant on outside contributions. 554 U.S. at 738. This reasoning applies equally to publicly funded candidates who are not dependent on outside contributions. What is more, the record demonstrates that when Arizona voters approved the Citizens Clean Elections Act, they were well aware of very serious corruption in their state.

3. The matching funds provision is substantially related to preventing corruption by making a public-funding program available while protecting the public fisc. In *Buckley*, this Court approved a public-funding

system that "substitutes public funding for what the parties would raise privately," 424 U.S. at 96 n.129, which is exactly the role of matching funds in Arizona's public-funding system. The matching funds provision also prevents the public-funding system from providing more funds than are necessary to run an effective campaign both because it caps total funds at three times the initial grant, and because it only disburses money when campaign activity exceeds the initial grant amount. A.R.S. § 16-952. Overfunding candidates would waste public money and run the risk of coercing candidates who would not otherwise choose to participate in the public-funding system to do so.

At bottom Arizona's public-funding system, which distributes two-thirds of the total funds available only as required by total spending in a particular race, is substantially related and narrowly tailored to Arizona's compelling interest in preventing *quid pro quo* corruption and the appearance of corruption, and for that reason the Court should uphold the court of appeals' decision rejecting Petitioners' First Amendment challenge.

ARGUMENT

I. BASED ON THE NATURE OF THE HARM THAT PETITIONERS ALLEGE, THE COURT SHOULD APPLY INTERMEDIATE SCRUTINY TO THE MATCHING FUNDS PROVISION OF ARIZONA'S PUBLIC FINANCING SYSTEM.

More than thirty years ago, this Court upheld the constitutionality of an optional public campaign-funding program in *Buckley*, 424 U.S. at 86-108. *Buckley's* analysis of the First Amendment and Equal Protection challenges to public funding did not apply strict scrutiny and deferred to congressional judgments regarding the funding and structure of the public-funding program. *Id.* at 90-108. In rejecting constitutional challenges based on various legal theories, this Court noted that the federal public-funding program was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. For that reason, the program "further[ed] . . . First Amendment values." *Id.* at 93.

In the instant case, Petitioners allege that their speech is chilled because they may choose to delay or avoid raising or spending money for their campaigns in an effort to delay or prevent public funds from being disbursed to their publicly funded opponents. *See, e.g.*, AFE Br. at 30 (alleging that independent expenditure groups and privately financed candidates

will avoid "spending money in support of their political cause" to prevent triggering matching funds); McComish Br. at 55 (alleging independent expenditure groups and privately financed candidates will "limit their fundraising and expenditures to avoid triggering matching funds"). The case law analogies that Petitioners ask the Court to accept do not support their position that strict scrutiny should govern the analysis of Petitioners' claims. First, the Court's *Davis* decision does not apply to this case because issuing matching funds is not a penalty or a discriminatory or asymmetric burden. Second, matching funds are not a variety of compelled speech because the provision neither requires Petitioners to fund the speech of their opponents, nor creates any confusion regarding the sponsorship of their opponents' speech.

The matching funds provision places no limit on the amount of funds that privately funded candidates and their supporters can raise or spend. It is merely a mechanism for allocating funds to candidates in a public-funding system. Thus, the burden that Petitioners allege is the kind of indirect, hypothetical burden on speech that the Court reviews under intermediate scrutiny. The Court's *Citizens United* decision affirming *Buckley* makes clear that campaign-finance regulations that limit neither contributions nor expenditures, such as disclosure requirements that are triggered by a privately funded candidate raising and spending money for political speech, are reviewed under intermediate scrutiny. *Citizens United*, 130 S. Ct. at 913-14; *Buckley*, 424 U.S. at 64-65.

A. This Court's *Davis* Decision Does Not Warrant Applying Strict Scrutiny Because the Act Is Nondiscriminatory, Does Not Limit Petitioners' Ability to Raise and Spend Money and Caps Participants' Funding Regardless of the Petitioners' Activities.

The upshot of Petitioners claim is that the Act's matching funds provision discriminates against them in a manner like the statute that this Court struck down in *Davis*. Not so. The provision at issue in *Davis* tied the hands of self-funded candidates with respect to their efforts to raise funds while releasing opponents from the same restrictions. The Act's matching funds provision does not discriminate against any political actor's speech, but rather distributes funds for which participating candidates have qualified based on aggregate activity in a race. It thus neither discriminates on the basis of identity nor imposes any limitations on political actors. The Court should decline to adopt Petitioners' mistaken reading of *Davis*.

In urging the Court to expand *Davis*, Petitioners oversimplify the Court's analysis and the details of the Bipartisan Campaign Reform Act of 2002 § 319(a) ("Millionaire's Amendment"). The Court noted in *Davis* that "[u]nder the usual circumstances, the same restrictions apply to all the competitors for a seat." 554 U.S. at 728; *see also* 2 U.S.C. § 441a(a)(1) (subjecting all congressional campaigns to the same contribution limits); 2 U.S.C. § 434(a)(2) (subjecting all congressional campaigns to the same disclosure requirements).

The Millionaire's Amendment replaced the normal rule in congressional elections with "a new, asymmetrical regulatory scheme." *Davis*, 554 U.S. at 729. In particular, § 319(a) provided that, once one of two or more privately funded candidates in a race spent more than $350,000 of personal funds on his campaign (subject to certain adjustments), the initial contribution limits were tripled and the limits on coordinated party/candidate expenditures were eliminated entirely – *but only for that privately financed candidate's privately financed opponent*. *Id.* at 729. Because the Millionaire's Amendment subjected otherwise similarly situated candidates to "asymmetrical" and "discriminatory" fundraising limitations based solely on one candidate spending personal funds, the Court concluded that the law resulted in an "unprecedented penalty" that was subject to strict scrutiny and was unsupported by any compelling interest. *Id.* at 739-40.

The matching funds provision of Arizona's public-financing system is not discriminatory or asymmetrical. First, consistent with *Buckley*, the Act offers all candidates a choice between two entirely different systems of financing, each with its own separate and distinct set of regulatory benefits and burdens. 424 U.S. at 87-90. The Act is not "discriminatory" or "asymmetrical" merely because only publicly funded candidates receive public funds, including matching funds. *See id.* at 97-98. Holding that issuing public funds to publicly funded candidates is somehow discriminatory or asymmetric would lead to the

"grossest" kind of discrimination because publicly funded candidates are subject to an entirely separate and distinct regulatory scheme. *Id.* ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . .") (internal quotation marks and citation omitted).

Unlike the Millionaire's Amendment, the matching funds provision does not impose any limit either on privately funded candidates or on their supporters. Rather, it empowers such entities to impact the timing and amount of money that will be disbursed to publicly funded candidates, potentially preventing publicly funded candidates from receiving up to two-thirds of the total funds available to them. In his deposition, campaign consultant Constantin Querard recognized that a publicly funded candidate must wait "for matching funds where your opponent can wait so long to spend that they give it to you at the last minute. You can't spend it." J.A. 597. Although empowered to do so, it is rarely wise for the privately funded candidate to suppress an opponent's speech by limiting the privately funded candidate's campaign activity. Dr. Kenneth Mayer stated in his declaration that "[t]he literature on campaign finance is nearly universal on this point: other things being equal, it is *always* in the candidate's interest to spend more money," and for that reason, he "would advise privately-funded candidates that it is unreasonable for them not to spend money on his or her campaign, solely because this might result in increased expenditures for the competing candidates." J.A. 539. Even if

the Court views this incentive to prevent one's opponents from speaking as a disincentive for privately funded candidates to speak, it is not the unprecedented penalty that the Court considered in *Davis* because it is neither discriminatory nor asymmetric.

In *Davis*, other privately funded candidates enjoyed higher contribution limits based solely on Davis's spending. The federal provision penalized privately funded candidates who chose to use personal monies to support their campaign and did not present self-financed candidates with a genuine choice between financing options as the public-funding scheme had in *Buckley*, 554 U.S. at 739.

In *Buckley*, the publicly funded candidates' countervailing burden of an expenditure limit offset any potential disadvantage that public funding imposed on the privately funded candidates. 424 U.S. at 95. The voluntary expenditure cap meant that nonparticipating "candidates [would] be able to spend more in relation to the [participating] candidates." *Id.* at 99. Because of this tradeoff, the public-funding scheme did "not unfairly or unnecessarily burden[ ] the political opportunity of any party or candidate." *Id.* at 95-96. Likewise, Arizona provides public funding of political campaigns, but only if participants agree to all of the following countervailing burdens: limits on their expenditure of personal funds, A.R.S. § 16-941(A)(2); limits on overall expenditures, *id.* § 16-941(A); lower contribution limits, *id.* § 16-945(A)(1); a requirement of collecting a minimum number of qualifying contributions, *id.* § 16-950(B), (D); a requirement of

participating in at least one public debate, *id.* § 16-956(A)(2); and a requirement of returning all unspent money to the Commission following the election, *id.* § 16-953. When compared to the gratuitous benefit granted to privately funded candidates in *Davis* who were not self-funded, the trade-offs and countervailing burdens required before a candidate becomes eligible for matching funds demonstrate that the provision does not grant publicly funded candidates a discriminatory or asymmetric advantage.

Petitioners acknowledge that "[i]nstead of imposing different fundraising limits on candidates in the same race, the Matching Funds Provision provides direct subsidies to candidates who participate in Arizona's public financing system." AFE Br. at 24. The Court recognizes the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy," and reviews the latter less strictly because "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher v. Roe*, 432 U.S. 464, 475 & n.9, 476 (1977) (citing *Buckley*, 424 U.S. at 94-95). Through the asymmetrical contribution limits in *Davis*, the government imposed its will by force of law. A public campaign-financing system provides funding to encourage actions deemed to be in the public interest. This distinction underlies Judge Kleinfeld's concurring opinion where he observed that "[b]ecause the

challenged scheme imposes no contribution or spending limits, it does not restrict speech at all . . . [he] cannot see why heightened scrutiny would apply." McComish Pet. App. 41.

Under Arizona's system, privately financed candidates and independent expenditure groups "retain the unfettered right to make unlimited . . . expenditures," while recipients of matching funds agree to strict limitations, including an absolute cap on expenditures. *Compare Davis*, 554 U.S. at 739, *with* A.R.S. § 16-952(E). As was the case in *Buckley*, the concomitant expenditure limit enhances privately funded candidates ability to outspend participating candidates. 424 U.S. at 104 ("The expenditure limitations on major parties participating in public financing enhance the ability of nonmajor parties to increase their spending relative to the major parties."). Like the public-funding program in *Buckley*, Arizona's public-funding program with matching funds may facilitate the ability of nonparticipating candidates to raise funds by making more private money available for political donations. *Id.* at 94 n.128; *see also id.* at 94-95 (noting that if privately funded candidates are unable to wage effective campaigns, it would not result from the public funds disbursed to their opponents but because of "their [own] inability to raise private contributions").

Once a publicly financed candidate reaches the matching funds cap, he or she receives no more funding, cannot raise additional funds, and is never relieved from other restrictions based on his or her

opponent's actions. A.R.S. § 16-952(E). The privately funded candidates in *Davis* who benefited from the Millionaire's Amendment, on the other hand, did not have to abide by any program restrictions and were free to outraise and outspend their privately funded, self-financed opponents even before the threshold was reached. Thus, *Davis*'s unique penalty on privately funded candidates who used personal monies does not control the analysis of Arizona's public-funding program.

B. *Pacific Gas* and *Tornillo* Do Not Apply Because the Act Does Not Compel Privately Funded Candidates to Promote Their Opponents' Political Speech.

This is also not a compelled speech case. No candidate or independent expenditure group is "obliged personally to express a message he disagrees with, imposed by the government." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (citing examples such as requiring students to recite the Pledge of Allegiance or license plates to bear the state's motto). Nor is any candidate or independent expenditure group "required by the government to subsidize a message he disagrees with, expressed by a private entity." *Id.* at 557-58 (identifying examples such as the use of mandatory bar fees or union dues to finance political speech unrelated to the private association's principal role for which membership is required). Finally, no candidate or independent expenditure group is forced to give others access to its own media

or to associate with a message with which it disagrees. *Cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality opinion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

Compelled access cases, a subset of compelled speech cases, are distinguishable from the public campaign-funding program at issue here. First, in the compelled access cases, a utility company and a newspaper were required to directly assist – through billing envelopes and column space, respectively – in disseminating the speaker's message. *Pac. Gas*, 475 U.S. at 6-7; *Tornillo*, 418 U.S. at 244. That is not the case here. The public-funding program is financed through voluntary donations, tax contributions, levies on criminal and civil fines, and qualifying contributions from Arizona voters. A.R.S. §§ 16-946(A), -954(A)-(C). Arizona does not require privately funded candidates to contribute air time or billboard space to disseminate the views of their publicly funded opponents. Thus, in addition to not requiring privately funded candidates and independent expenditure groups to finance the speech of publicly funded candidates, the Act does not create an impression that privately funded candidates or independent expenditure groups endorse the message of publicly funded candidates.

Second, the compelled access in *Pacific Gas* and *Tornillo* were content-based. *Pac. Gas*, 475 U.S. at 14-15 (citing *Buckley*, 424 U.S. at 97-105, and *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546-50 (1983)). In contrast, matching funds are available to candidates regardless of either the content or

medium of the message they produce with the funds. *See Regan*, 461 U.S. at 548 (holding that government subsidies of veterans organizations' lobbying was content-neutral because the groups received the subsidy "regardless of the content of any speech they may use, including lobbying"). Furthermore, the matching funds provision provides funding based on disclosures of electioneering communication required by circumstances analogous to those required by federal election law. *Compare* A.R.S. §§ 16-901.01, -958 *with* 2 U.S.C. § 434(f); *see also Federal Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007). This Court has expressly held that strict scrutiny does not apply to such regulations. *Citizens United*, 130 S. Ct. at 914; *see also Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188-89 (2007) (stating that strict scrutiny is not warranted where the risk that government might drive certain ideas from the marketplace is "inconsequential" and noting that "it is well established that the government can make content-based distinctions when it subsidizes speech"). In addition, Arizona frequently disburses matching funds to candidates in the same race who have opposing viewpoints. *See, e.g.*, J.A. 756 (matching funds issued to Corporation Commission candidates of both parties), 760 (same for State Representative District 8). Hence the matching funds provision is content-neutral.

Finally, even though the Court cited *Pacific Gas* in *Davis*, the Court has made clear that the "[f]acilitation of speech to which a . . . party may choose to respond does not amount to forcing the . . . party to

speak." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008); *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006) ("The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."). Nothing in the record supports the conclusion that any candidate's or independent expenditure committee's "own message" was affected by the issuance of matching funds. Petitioners do not "have the right to be free from vigorous debate," *Pac. Gas*, 475 U.S. at 14, which is exactly the remedy that they seek here.

C. The Matching Funds Provision Imposes No Ceiling on Campaign-Related Activity and Creates at Most a Hypothetical, Indirect Burden on the Speech of Privately Funded Speakers.

The heart of Petitioners' claim is that the manner in which the State distributes two-thirds of the public funding available to participating candidates may, like the compelled disclosure requirements in *Buckley*, "deter some individuals who otherwise might contribute" from contributing to campaigns. 424 U.S. at 65-68. The Court should analyze the funding provision under intermediate scrutiny, as it does other hypothetical, indirect burdens on speech. The Ninth Circuit explained that "[a]lthough Plaintiffs cannot point to any specific instances in which their speech

has been chilled because of the Act, we recognize that under the Supreme Court's jurisprudence, even laws that create only potential chilling effects impose some First Amendment burden." McComish Pet. App. 32. Although the Act's structure and purpose support Judge Kleinfeld's view that Arizona's law imposes no burden at all on the speech of privately funded candidates and their supporters, *id.* at 39, the majority's analysis is also consistent with this Court's precedent.

In *Buckley*, this Court drew the analogy between campaign finance and other electoral regulations. 424 U.S. at 95. Thus in campaign finance regulation, as in other electoral regulations, the Court should apply a "flexible standard" that assesses whether state interests are "sufficiently weighty to justify the limitation" and "reject[] the argument that strict scrutiny applies to all laws imposing a burden." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190-91 & n.8 (2008) (plurality opinion) (internal quotation marks and citations omitted). Arizona's matching funds provision imposes no direct limits on either contributions or expenditures of non-participating candidates and their supporters. A.R.S. § 16-952. Indeed, as was true in the law upheld in *Buckley*, the candidates choosing to accept public funding are subject to strict contribution and expenditures limits that do not apply to non-participating candidates. *Compare id.* § 16-941(A) (restrictions on candidates participating in Clean Elections program), *with Buckley*, 424 U.S. at 94-95. The matching funds provision at issue here is merely

a mechanism for determining how much public funding to release to participating candidates from the preset allocation. *Cf. Buckley*, 424 U.S. at 91 n.124 ("The . . . check-off is simply the means by which Congress determines the amount of its appropriation.").

The burden that Petitioners postulate is similar to the burden associated with disclosure requirements. In considering the constitutionality of the disclosure provisions in the Federal Election Campaign Act ("FECA"), the *Buckley* Court assumed that "compelled disclosure ha[d] the potential for substantially infringing the exercise of First Amendment rights" and that it would "deter some individuals who otherwise might contribute." *Id.* at 66, 68. *Buckley*, however, did not apply strict scrutiny to FECA's disclosure provisions. Instead, it inquired whether those provisions exhibited a "substantial relation between the governmental interest and the information required to be disclosed." *Id.* at 64 (internal quotation marks, citations, and footnote omitted). In applying this intermediate level of scrutiny, the Court recognized that the burdens of disclosure were not equivalent in magnitude to the burden of an expenditure limit because "disclosure requirements impose no ceiling on campaign-related activities." *Id.* Requiring disclosure of independent expenditures, the Court held, "is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82 (footnote omitted).

The Court recently reaffirmed the appropriateness of applying intermediate scrutiny to campaign-finance laws that may indirectly burden campaign expenditures. In *Citizens United*, the Court upheld disclaimer and disclosure provisions of the BCRA. 130 S. Ct. at 913-14. The disclaimer provision required, among other things, that a televised electioneering communication include a statement that "_____ is responsible for the content of this advertising," while its disclosure provision compelled those spending above $10,000 on electioneering communications to report their expenditures to the Federal Election Commission. *Id.* This Court in *Citizens United* as it had in *Buckley* found that disclaimer and disclosure requirements may burden speech, but that they impose no ceiling on campaign-related activities and do not prevent anyone from speaking. *Id.* at 914; *see also Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (intermediate scrutiny applies to disclosure of referendum petition information). The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. *Doe*, 130 S. Ct. at 2818; *Citizens United*, 130 S. Ct. at 914.

Like disclosure requirements, matching funds do not impose a ceiling on campaign activities and do not prevent anyone from speaking. They do not operate as expenditure limits. Candidates may choose to exceed the threshold for triggering matching funds and, as the record demonstrates, have done so repeatedly

in the past. *See, e.g.*, J.A. 479-529 (CCEC 2002 Disbursement Summary indicating numerous matching payments), 876-77 (identifying 2006 candidates that triggered matching funds), 974-75 (Lang Declaration reporting matching funds triggered by Petitioners).

Even if matching funds pose a "potentially significant burden" in some circumstances as the Court suggested by citing *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), in *Davis*, 554 U.S. at 739, that does not mean that the Court must apply strict scrutiny in this case. For example, in *Buckley* this Court assumed that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," but it still reviewed the disclosure requirements under intermediate scrutiny. *Buckley*, 424 U.S. at 66. The Court characterized the harm in *Davis* as more than a "potentially significant burden"; it described the provision at issue there as an "unprecedented penalty" on the candidate who chose to use personal funds to support his campaign. 554 U.S. at 739. The matching funds provision imposes no penalty on privately funded candidates; it merely establishes the timing and allocation of limited public funds based on aggregate campaign activity.

The record below confirms that Arizona's public-funding program has not resulted in less speech. Spending by privately funded candidates has not clustered just below the matching funds threshold as one would have expected it to if matching funds discouraged expenditures. J.A. 876-77. As the district court found, "[i]t is undisputed that campaign spending has

increased since the Act's passage," and "[p]laintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act." McComish Pet. App. 53-54. Some Plaintiffs could not even recall whether they had triggered matching funds in their campaigns. *See, e.g.*, J.A. 433-34 (Robert Burns Deposition), 575 (Dean Martin Deposition). "Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates." *Buckley*, 424 U.S. at 101. This has remained true in Arizona. From 2002 to 2008, between thirty-three and forty-eight percent of candidates for state office have privately financed their campaigns. McComish Pet. App. 15-16.

Petitioners claim that the Ninth Circuit was wrong to rely on this Court's approval of public campaign-financing in *Buckley* but recognize that "the system in *Buckley* was designed to provide an alternative to candidates who wished to lessen their reliance on private funds." AFE Br. at 36. Arizona voters provided an alternative to candidates who wish to lessen their reliance on private funds by approving a law that explicitly declared the "intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special interest money." A.R.S. § 16-940(A).

The exercise of free speech has increased since the Act's passage. Again, the district court found, "[i]t is undisputed that campaign spending has increased

since the Act's passage." McComish Pet. App. 53. By providing for increased debate about issues of public concern that privately funded candidates raise, the Act's matching funds promote the free and open debate that the First Amendment was intended to foster. Like the federal program at issue in *Buckley*, Arizona voters did not adopt the Act "to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93. Striking down the matching funds provision would reduce "the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. This would ultimately undermine the First Amendment's purpose. *See Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) ("[T]he First Amendment favors dissemination of information and opinion."); *see also Citizens United*, 130 S. Ct. at 911 (heralding "our law and our tradition that more speech, not less, is the governing rule"). "[T]here is no such thing as *too much* speech." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 259 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled in part on other grounds by Citizens United*, 130 S. Ct. at 913.

Because the Act only indirectly burdens privately funded candidates and independent expenditure groups, and because it, like the program approved in *Buckley*, promotes free speech, the Court should

review the Act's matching funds provision under intermediate scrutiny.

II. THE CITIZENS CLEAN ELECTIONS ACT FURTHERS ARIZONA'S IMPORTANT AND COMPELLING GOVERNMENTAL INTEREST IN PREVENTING CORRUPTION AND THE APPEARANCE OF CORRUPTION.

The Act furthers Arizona's interest in preventing corruption and the appearance of corruption. Corruption strikes at the core of self-government – it is an attack on democracy itself. Accordingly this Court has long recognized that fighting corruption and the appearance of corruption is "'critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). The structure of the Constitution itself is a bulwark against corruption. The Framers recognized that a successful government required "that every practicable obstacle should be opposed to cabal, intrigue, and corruption." *The Federalist No.* 68, at 364 (Alexander Hamilton). Elections themselves are part of the Constitution's anticorruption structure, because "if the proofs of that corruption should be satisfactory, the usual propensity of human nature will warrant us in concluding that there would be commonly no defect of inclination in the body to divert the public resentment from themselves by a ready sacrifice of the authors of their mismanagement and disgrace."

The Federalist No. 66, at 356 (Alexander Hamilton); *see generally* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009) (reviewing the evolution of the concept of corruption since the framing of the Constitution). In passing the Citizens Clean Elections Act, the citizens of Arizona were participating in the long American tradition of forming a system of government that would be resistant to cabal, intrigue, and corruption.

A. States Have Authority to Enact Measures to Prevent Corruption and the Appearance of Corruption.

States have a "legitimate and compelling" interest in preventing corruption and its appearance. *NCPAC*, 470 U.S. at 496-97; *accord Colo. Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 641 (1996) (Thomas, J., concurring) (noting that in "the context of campaign finance reform, the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption"); *see also Wisc. Right to Life, Inc.*, 551 U.S. at 478 (noting Court's long recognition of government's interest in preventing corruption or the appearance of corruption). Accordingly, the Court has approved state actions that punish corruption, such as bribery laws, and prevent such abuses, such as campaign finances laws, and will not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Comm'n v.*

Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982). In *Citizens United*, the Court upheld disclosure requirements because they addressed the practice of independent groups "running election-related advertisements while hiding behind dubious and misleading names," noting that disclosures "help citizens make informed choices in the political marketplace." 130 S. Ct. at 914 (internal quotation marks and citations omitted).

The Court has similarly recognized the state's strong interest in undertaking prophylactic measures to protect the integrity of the election process itself. *See Crawford*, 553 U.S. at 194-95, 203 (upholding photo-identification to deter voter fraud); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion) (upholding prohibition on campaigning within 100 feet of polling place and explaining that "[t]he Court . . . has recognized that a State 'indisputably has a compelling interest in preserving the integrity of its election process'") (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)); *see also Doe*, 130 S. Ct. at 2819 (states may disclose signatory information of referendum petitions to preserve "the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability").

The voters in Arizona who enacted the Act were cognizant of actual and apparent political corruption of all kinds. A.R.S. § 16-940; *see Buckley*, 424 U.S. at 27 (noting "the impact of the appearance of corruption stemming from public awareness of the

opportunities for abuse inherent in" campaign financing). As the Ninth Circuit explained, Arizona citizens endured images of legislators and lobbyists scoffing at contributions limits and literally taking duffle bags full of cash in exchange for sponsoring legislation. Pet. App. 8-9 (describing AzScam as "[a] sting operation [that] caught state legislators on videotape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation"); *see also* J.A. 138, 150; *see generally* J.A. 122-212, 214-25. These examples demonstrate that, as was the case in *Buckley*, "the problem is not an illusory one." 424 U.S. at 27.

Providing a public-funding option to candidates is a powerful tool in preventing what the Court has described as "[t]he hallmark of corruption . . . financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497; *see Buckley*, 424 U.S. at 96 (identifying "public financing as a means of eliminating the improper influence of large private contributions"). The Act explicitly seeks to reform Arizona's election-financing system to eliminate dollars for political favors, or in the words of the Act, "subsidies and special privileges for campaign contributors." A.R.S. § 16-940(B)(6). The Act offers an avenue for candidates to avoid "receipt of what we can call the 'quids' in the *quid pro quo* formulation." *McConnell*, 540 U.S. at 292 (Kennedy, J., concurring in part and dissenting in part). Indeed, publicly funded candidates may not accept any 'quids,' except for an extremely limited number of small private contributions. A.R.S.

§ 16-945(A). As this Court explained in *Davis*, "the use of personal funds . . . reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which . . . contribution limitations are directed." 554 U.S. at 738 (internal quotation marks omitted) (quoting *Buckley*, 424 U.S. at 53). Likewise, the use of public funds *eliminates* the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which contribution limits are directed.[8]

The matching funds provision is an important part of Arizona's public campaign-financing system, making it possible to offer a viable public-financing option within the constraints of scarce government resources. *See Buckley*, 424 U.S. at 103 (recognizing government's interest in placing limits on public financing to protect the public fisc). The record supports the conclusion that the matching funds provision enables

[8] To the extent petitioners seek to controvert the State's asserted interest, their arguments surely fail. "The quantum of evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the *novelty and plausibility* of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (emphasis added). Like the contribution limits at issue in *Nixon*, the Act is not justified on a novel theory, and "[i]n any event, this case does not present a close call requiring further definition of whatever the State's evidentiary obligation may be." *Id.* at 393.

candidates to participate in public financing. *E.g.*, J.A. 429-30, 542-43. And the record demonstrates that campaign consultants and the Act's opponents recognize that without the matching funds provision participation "probably would stop." J.A. 590-92, 638. Likewise, expert testimony establishes that matching provisions are key to encouraging participation. J.A. 537-39.

B. The Act Does Not Level Electoral Opportunities Unconstitutionally.

Attempting to avoid these settled principles concerning the State's legitimate anticorruption interests, Petitioners claim that the "true" purpose of the matching funds provision is to "level the playing field," and that such an interest is illegitimate. *E.g.*, AFE Br. at 57-58. However, if one interest is sufficient to justify a statute, the Court need not examine the sufficiency of each interest promoted by a statute. *See, e.g.*, *Citizens United*, 130 S. Ct. at 915-16 ("Because the informational interest alone is sufficient to justify application of § 201 to these ads, it is not necessary to consider the Government's other asserted interests."). Furthermore, "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 361, 383 (1968). While legislative history may assist in the construction of an act, "[i]t is entirely a different matter when [the Court is] asked to void a statute that is, under

well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of [people] said about it." *Id.* This is particularly so, where, as in this case, Petitioners rely principally on statements not of legislators or voters who enacted the measure, but "the motives of a particular group that lobbied for or against a certain proposal – even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001). In any event, as the Ninth Circuit acknowledged, legitimate concerns about *quid pro quo* corruption and the appearance of corruption in Arizona politics motivated voters to approve the Act. McComish Pet. App. 9-11.

Petitioners attempt to leverage any use of the phrase "level the playing field" into a statement of illicit intent is misleading in the context of their challenge to the matching funds provision. As noted above, Petitioners rely on numerous statements by purported proponents of the Act in an attempt to suss out some illegitimate motive. However, isolated claims made during the Act's drafting and passage by supporters are not probative of the electorate's intent. Arizona courts interpret the view of the electorate with reference to the State-issued materials provided to voters. *See, e.g., State v. Gomez*, 127 P.3d 873, 877 (Ariz. 2006) (examining findings in State publicity pamphlet to determine purpose). Further, post-enactment statements are of no value whatever. *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*,

130 S. Ct. 1396, 1409 (2010) ("Needless to say, this [material] does not qualify as legislative 'history,' given that it was written 13 years after the amendments were enacted. It is consequently of scant or no value for our purposes.").

Petitioners argue that the term "level the playing field" is always the equivalent of the Court's use of the phrase "level electoral opportunities." *See, e.g.*, McComish Br. at 38, 64 (suggesting that use of the phrase "level the playing field" is always equivalent to its usage in *Davis*); AFE Br. at 8-12 (same); *see also Davis*, 554 U.S. at 741-42 (rejecting the notion that one may level electoral opportunities by "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others") (quoting *Buckley*, 424 U.S. at 48-49). But contrary to Petitioners' claim, the term "level the playing field" has been used in a variety of ways by the Commission and others and not synonymously with the Court's description of "level electoral opportunities."

The promotion of participation by voters through qualifying contributions, J.A. 308, 852, or expanding electoral opportunities to candidates who might otherwise choose not run, J.A. 816, 819, 821, does not imply that the matching funds provision was designed to limit the expenditures of non-participants, AFE Br. at 9. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 648 (1994) (finding that the government's recognition of the "intrinsic value" of speech does not demonstrate purpose of the must-carry provision was to discriminate against other speech). Nor do

statements from unrelated administrative hearings conducted more than a decade ago support Petitioners, but confirm that the Commission's position was to oppose matching funds grants that penalized nonparticipating candidates. J.A. 236. Likewise, to the extent the term "level the playing field" has been used to describe the matching funds provision, the statements relied upon by Petitioners make clear that the provision operates to allay candidate concerns that choosing public financing will prevent them from running a viable campaign. J.A. 811, 845, 851. In other words, the term "level the playing field" in the context of the matching funds provision only speaks to the very real concern that absent a mechanism that reflected the operation of campaigns, the public financing system simply could not operate.

Petitioners' reliance on *Davis* in this context is particularly misplaced. *See, e.g.*, McComish Br. at 64, AFE Br. at 24-25. The statutory provision in *Davis* did not prevent corruption, but "level[ed] electoral opportunities for candidates of different personal wealth." 554 U.S. at 741. The Millionaire's Amendment discouraged wealthy candidates from using their wealth to contribute to the outcome of the election by first requiring such candidates to declare within fifteen days of entering the race by how much they intended to exceed the threshold, then requiring reports within twenty-four hours of expenditures, and finally, based on reports from the self-funded candidate, and only the self-funded candidate, allowing the privately funded candidates that were not self-funded

to raise funds "pursuant to the asymmetrical limitations." *Id.* at 730-31. By contrast, the Act does not require those who intend to engage in express advocacy to announce their intentions at the beginning of the campaign and all privately funded candidates have the same reporting requirements. *See, e.g.*, A.R.S. § 16-958. Under the Commission's rules, publicly funded candidates have additional reporting requirements. Ariz. Admin. Code R2-20-109(B), *Citizens Clean Elections Act & Rules Manual*, http://azcleanelections.gov/ (follow "Acts and Rules Manual" hyperlink). Most importantly, in issuing funds pursuant to the matching funds provision, the Act does not discriminate based on the source of the campaign activity. A.R.S. § 16-952. All in all, the operation of the Millionaire's Amendment was focused completely on the self-funded candidate and discouraging his or her spending; the operation of the matching funds provision is focused on the publicly funded candidate and allocating the remaining public funds to him or her.

C. The Act Does Not Unconstitutionally Seek to Reduce the Cost of Elections.

Similarly, Petitioners' argument that the purpose of the Act and the matching funds provision is to unconstitutionally limit campaign spending misstates the history of the act. AFE Br. at 37-39; McComish Br. at 65-66. There is no dispute that a problem identified in the Act with Arizona's election-financing system was that it "[d]rives up the cost of running for state office, discouraging otherwise qualified

candidates who lack personal wealth or access to special-interest funding." A.R.S. § 16-940(B)(7). And, indeed, the Act explicitly limits campaign spending of participating candidates – it is central to the agreement that participating candidates make. *Id.* § 16-941(A). The Act does not, however, address the rising cost of running for state office through compelling all parties to spend less; rather, it provides a viable, voluntary alternative to private funding. And, as noted above, the matching funds provision wholly grants privately financed actors control over the amount of spending in a race – it does not limit their expenditures and gives them authentic power over the amount of money a participating candidate will actually receive. Further, even if an isolated statement by Act supporters ties the matching funds provision to the idea of creating disincentives to speech by privately funded actors, "what motivates one [person] to make a speech about a statute is not necessarily what motivates scores of others to enact it." *O'Brien*, 391 U.S. at 384.

III. THE MATCHING FUNDS PROVISION SURVIVES BOTH INTERMEDIATE AND STRICT SCRUTINY BECAUSE IT IS SUBSTANTIALLY RELATED AND NARROWLY TAILORED TO A SUFFICIENTLY IMPORTANT AND COMPELLING ANTICORRUPTION INTEREST.

As discussed above, Arizona has a sufficiently important, even compelling, anticorruption interest

that is served by its public-financing system. *Buckley*, 424 U.S. at 96 (noting that "[i]t cannot be gainsaid that public financing . . . furthers a significant governmental interest"). A public-funding system "substitutes" for a private-funding system. *See id.* at 96 n.129. The matching funds provision allows for funds to be distributed based on activity in a particular race. A.R.S. § 16-952. In races that are very competitive, as indicated by significant spending by independent expenditure groups or privately financed candidates, the public-funding system must provide sufficient funds for a viable publicly funded campaign. As the Ninth Circuit found, removing this funding "would substantially diminish the Act's ability to attract participants, thereby undermining its ability to prevent corruption." McComish Pet. App. 38.[7] Of course, the Act need not, and does not, provide

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[7] Petitioner McComish reaches outside the record to note that participation in the program continued to be about 50 percent for the 2010 election cycle after the matching funds provision was enjoined in June of that election year. McComish Br. at 85 n. 5. They argue that this shows that participation will continue even without the funds. *Id.* This speculation is inappropriate for two reasons. First, this Court's review of the Ninth Circuit decision should be based on the summary judgment record, not information that is outside the record and untested through the discovery process. *Lawn v. United States*, 355 U.S. 339, 354 (1958) (noting that the Court "must look only to the certified record in deciding questions presented"). Second, the participation level found at the cite provided by Petitioners is actually lower than the participation rates since 2002, McComish Pet. App. at 15-16, and matching funds were available until June 2010, meaning some campaigns that might have otherwise decided not to participate did not have time to change strategy for the 2010 elections.

equality of funding. A publicly funded candidate facing privately funded opponents that spend in aggregate more than three times the initial grant will have no additional resources to respond. A.R.S. § 16-952(E). Nonetheless, the citizens of Arizona determined that three times the initial grant was sufficient to create a viable public-funding option even in the most competitive races. *See* J.A. 716 (Hoffman Deposition discussing the basis of setting funding limits).

As the Court of Appeals explained, "[t]he more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption, because fewer of those elected officials will have accepted a private campaign contribution and thus be viewed as beholden to their campaign contributors or as susceptible to such influence." McComish Pet. App. 37. Dr. Mayer's expert report provides empirical evidence to support the logical connection between matching funds and participation in the public-funding system. J.A. 537-39. In Wisconsin, where candidates receive an initial grant comparable to that issued in Arizona, but where there are no matching funds, participation in 2006 was only 15%, as compared to 60% in Arizona that year. *Id.* 537-38.[8] Arizona's interest in keeping its

[8] In contrast, the court in *Day* did not address whether the law at issue served an anti-corruption purpose because participation in the public finance system was nearly 100% without matching funds. *See Day*, 34 F.3d at 1361. Further, the State in that case did not develop a factual record as to whether participation would decline absent the matching funds provision, which is not the case here. *Id.* at 1361 n.6.

matching funds provision in place is compelling and not at all abstract and it is substantially related to the Act's purpose.

Petitioners argue that the Act "does not directly serve anticorruption purposes," and should, thus, be subjected to the same level of scrutiny as BCRA's provision that made "it a crime for any labor union or incorporated entity . . . to use its general treasury funds to pay for any 'electioneering communication,'" *Wisc. Right to Life*, 551 U.S. at 457 (quoting 2 U.S.C. § 441b(b)(2)); *see* McComish Br. at 81-83; AFE Br. at 54. This argument is incorrect as it removes *Wisconsin Right to Life* from its contextual moorings. In that case, the government argued that an "expansive definition of 'functional equivalent' is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions." 551 U.S. at 479. In other words, the government argued that one speech restriction was required to enforce another speech restriction. By contrast, public financing is a direct effort to fight corruption that does not in and of itself burden speech. The matching funds provision directly serves the anticorruption interest because without it, candidates would not participate in the public financing system. Further, to the extent that it burdens speech at all, a point which the State does not concede, the burden is functionally identical to burdens this Court has routinely upheld.

The district court noted that "[i]f a single lump sum award would not burden Plaintiff's free speech in any cognizable way, finding a burden solely because of the incremental nature of the awards seems difficult to establish." McComish Pet. App. 66-67. Petitioners do not, and cannot, claim that a single lump sum payment to publicly funded candidates burdens the speech of privately funded candidates and independent groups. In *Buckley*, the Court upheld a series of laws providing "[f]ull funding for major party candidates" and partial "funding for minor party, new party, and independent candidates . . . based upon their performance in the last election or showing." S. Rep. No. 93-689, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5589. Congress manifested its intent to provide complete support by establishing "public financing equal to the full amount of expenditures permitted to be made in a campaign." *Id.* at 5, 1974 U.S.C.C.A.N. at 5592. Public funding served to guarantee serious candidates the "adequate financing to run a fully informative and effective campaign." *Id.* at 6, 1974 U.S.C.C.A.N. at 5592; *see Buckley*, 424 U.S. at 85-109 (upholding public funding).

Arizona's public-funding system provides full funding to candidates only when necessary to run a "fully informative and effective campaign." S. Rep. No. 93-689, at 6, 1974 U.S.C.C.A.N. at 5592. These piecemeal grants distributed throughout the campaign are more closely drawn to the Act's interest in

preventing corruption while protecting the public fisc than a single lump-sum payment.

The matching funds provision along with other provisions of the Act, such as the requirement that publicly funded candidates return all unspent money to the Commission following the election, A.R.S. § 16-953, and providing only limited funds to unopposed candidates, *id.* § 16-951(A)(3), ensure that the Act does not grant publicly funded candidates more funds than necessary to encourage participation. If Arizona is prohibited from tailoring the timing and amount of funds to the needs of individual races, it will necessarily run the risk of underfunding competitive races – thus limiting the Act's anticorruption impact – or overfunding uncompetitive races – thus wasting public money and running the risk of making the program impermissibly coercive, *cf. Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) ("[T]here is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.").

The Act, including its matching funds provision, represents the least restrictive means for the citizens of Arizona to discourage *quid pro quo* corruption within their state. In *Buckley*, the Court rejected the assertion that campaign contribution limits were a more restrictive alternative to fighting the corruption of large campaign contributions than enforcing criminal bribery laws or disclosure requirements. 424 U.S. at 27-28. The Court explained that bribery laws "deal with only the most blatant and specific" examples of

corruption and "Congress was surely entitled to conclude that disclosure was only a partial measure." *Id.* Accordingly, the Court upheld contribution limits as a means to address the corruption associated with large donations. *Id.* Whatever claims Petitioners can make about a chilling effect when funds are issued to publicly funded candidates, such action is less restrictive than directly limiting the contributions to Petitioners or expenditures made by Petitioners. Furthermore, given Arizona's history of political corruption even within a system of contribution limits, the Act and its matching funds provision precisely address the issue of *quid pro quo* corruption. A voluntary public-financing system, which conditions the release of public funds on the aggregate campaign activity in a race, is the least restrictive, effective means for the State to fight *quid pro quo* corruption.[9]

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[9] McComish Petitioners argue the Court may affirm the district court based on the Ninth Circuit's treatment of the summary judgment evidence. McComish Br. at 86 n.6. This is distinct from the constitutional claims asserted in their petition and is not fairly included in the question presented. *See* Sup. Ct. R. 14.1; *see also Wood v. Allen*, 130 S. Ct. 841, 851 (2010). Further, the Ninth Circuit correctly concluded the district court's ruling did not approve, sub silentio, plaintiff's evidentiary objections. McComish Pet. App. 21 & n.8; *Vinson v. Thomas*, 288 F.3d 1145, 1152 & n.8 (9th Cir. 2002).

(Continued on following page)

CONCLUSION

Based on the foregoing, Respondents request that the Court affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted.

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February, 2011

McComish Petitioners also argue if the Court invalidates § 16-952 it should "strike down the entire system." McComish Br. at 80. If reached, the Court should reject this argument. Under A.R.S. § 16-960, "[i]f a provision of this act . . . is held invalid, the invalidity does not affect other provisions . . ." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) ("Severability is of course a matter of state law."), *Randolph v. Groscost*, 989 P.2d 751, 755 (Ariz. 1999) (holding that the valid portion of a voter-approved measure will be upheld unless doing so would produce an absurd result).